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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 9th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Monday, 22 June 1998, at 10 a.m.

Chairman: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 10.10 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Add.1/Corr.1)

Part 3 of the draft Statute (*continued*) (A/CONF.183/C.1/WGGP/L.4 and Corr.1)

1. **The CHAIRMAN** invited the Coordinator for Part 3 and Chairman of the Working Group on General Principles of Criminal Law to give a progress report.

2. **Mr. SALAND** (Sweden), Coordinator for Part 3 and Chairman of the Working Group on General Principles of Criminal Law, said that paragraph 1 of article 22 on non-retroactivity was not disputed and could therefore be submitted to the Drafting Committee. In informal consultations, it had been agreed that any outstanding issues could be covered by a paragraph 1 *bis*. Paragraph 1 of article 24, on irrelevance of official position, had already been submitted to the Drafting Committee, which could undoubtedly also address the drafting suggestions made in respect of paragraph 2 of that article. Following a discussion on article 27 ("Statute of limitations"), it had been agreed that the issue that had been raised related more to Part 9 ("International cooperation and judicial assistance"). Subject to those understandings, the Committee might wish to approve the articles as they appeared in document A/CONF.183/C.1/WGGP/L.4 and Corr.1.

3. **Mr. GARCIA LABAJO** (Spain) said that he had no objection to the referral of the articles to the Drafting Committee, but it was his understanding that the title of Part 3 and the possibility of moving paragraph 1 of article 22 to Part 2 remained open.

4. **The CHAIRMAN** said he took it that the Committee agreed to refer to the Drafting Committee the following articles: article 21; article 22; article 23, paragraphs 1, 2, 4 and 7, apart from 7 (c); article 24, paragraph 2; article "X" (former article 26); article 27. He further took it that the Committee agreed to the deletion of paragraph 3 of article 23, paragraph 4 of article 29 and the bracketed second paragraph of the definition of the crime of genocide in article 5.

5. *It was so decided.*

Part 2 of the draft Statute (*continued*) (A/CONF.183/C.1/L.1 and L.4)

6. **Ms. WONG** (New Zealand) referred to the "Further option for articles 6, 7, 10 and 11" following draft article 13 in document A/CONF.183/2/Add.1, and said that her delegation supported the texts proposed there for subparagraph (a) of article 6 and for the second subparagraph (b) (concerning the Security Council) of the same article.

7. The argument against Security Council referral put forward at an earlier meeting on the basis of the political nature of the Security Council was difficult to accept. State referrals would also be political; that was entirely appropriate. The suggestion to provide for referral by the United Nations Commission on Human Rights was an interesting idea, and it might be useful to consider creating a nexus between the United Nations human rights machinery and the Court.

8. In relation to the further option for article 7, New Zealand supported the option of the Court having inherent or universal jurisdiction without a need for express State consent. The Court would then have jurisdiction over the core crimes which were already crimes of universal jurisdiction irrespective of whether States were party to the Statute or not, and would be able to exercise its jurisdiction regardless of whether the territorial State had accepted its jurisdiction. Under that approach, articles 7 and 9 would not be necessary.

9. The proposal by the Republic of Korea for an expanded list of categories of States, any of which could provide the necessary consent, went some way to creating a legal nexus between the event and the Court. One of the States involved in the event would need either to be a party or to give its express consent, but the action could not be blocked by other States. The requirement for State consent under that proposal would not be cumulative, but her delegation still saw a problem in any approach that required State consent, because the Court would have no jurisdiction over a crime committed entirely within the territory of a non-State party unless that State consented or the Security Council took action.

10. The suggestion by the French delegation that it should be necessary for the State of territory and possibly the State of nationality to consent might create a problem by enabling a State whose national had committed serious crimes in another State to withhold its consent and shield the accused. That would not contribute to enhancing peace and security, which was a major reason for creating the Court. New Zealand consequently favoured the deletion of paragraph 2 of article 7 and an amendment to paragraph 3 of article 7 as proposed by Germany. It might be willing to consider the approach of the Republic of Korea as an alternative.

11. **Mr. PIRAGOFF** (Canada) said that Canada was committed to a court with inherent or automatic jurisdiction over the three core categories of crime: genocide, war crimes and crimes against humanity. An "opt-in" or State consent regime would allow States to veto Court action and would render the Court ineffective. The number of States whose acceptance was required must be kept to the minimum.

12. Article 6 should allow Court jurisdiction to be triggered by any State party, and States parties should refer situations rather than specific cases. Canada supported the further options for articles 6, 7 and 11 as the best bridge between different positions and a basis for real progress.

13. **Mr. NIYOMRERKS** (Thailand) thought that State consent to the Court's jurisdiction was indispensable for the Court to exercise it function.

14. His delegation supported the proposal made by the Republic of Korea for paragraph 1 of article 6. Regarding paragraph 2 of article 6 as it appeared in the first version of that article in document A/CONF.183/2/Add.1, the words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9" should be retained.

15. With regard to preconditions to the exercise of jurisdiction, his delegation supported the article 8 proposed by the Republic of Korea. On article 9, his delegation preferred option 1, with inherent jurisdiction remaining intact. On the referral of a situation by a State, his delegation preferred the draft article 11 in the "Further option for articles 6, 7, 10 and 11".

16. **Mr. HAMDAN** (Lebanon) said that the Court's powers should be exercised following an initial request by a State. Technical problems would arise if intergovernmental organizations were allowed to bring complaints before the Court. However, under article 8 the Court should be able to consider crimes falling within its competence which

began before but continued after the entry into force of the Statute. The phrase "unless these crimes continue" should therefore be added at the end of paragraph 1 of article 8.

17. Paragraph 4 of the first version of article 7, under which a State not a party to the Statute could agree to the competence of the Court, was acceptable. With regard to article 10, option 1 for paragraph 4 and both options for paragraph 7 were unacceptable as the Court should not have to wait until the Security Council took a decision on the question of a military threat, act of aggression or breach of the peace.

18. Under article 11, complaints should be submitted on the basis of full information which should first be examined by the Pre-Trial Chamber in accordance with article 13. It was inappropriate to assign any role to non-governmental organizations in articles 12 or 13.

19. **Mr. POLITI** (Italy) said that each State party to the Statute should be authorized to lodge complaints. There was much merit in the idea that States parties should refer to the Court situations in which one or more crimes within the Court's jurisdiction appeared to have been committed. It would then be up to the Prosecutor to determine whether one or more specific persons should be charged with the crimes. Both those points were well reflected in the drafts for articles 6 (a) and 11 in the "Further option for articles 6, 7, 10 and 11", and his delegation supported them.

20. With regard to the preconditions to the exercise of jurisdiction and acceptance of jurisdiction in articles 7 and 9 of the draft Statute, including article 7 in the "Further option for articles 6, 7, 10 and 11", Italy strongly supported a system of inherent Court jurisdiction over core crimes under customary international law, and consequently opposed any regime requiring specific consent by the States concerned other than the consent given in becoming parties to the Statute. The German proposal included in the "further option" for article 9 was fully consistent with Italy's approach and would obviate any loopholes in the jurisdiction provisions of the Statute. However, given the major difficulties that a number of States had with the German proposal, it would be more realistic to follow the United Kingdom approach reflected in article 7 in the "Further option for articles 6, 7, 10 and 11". In that connection, limiting the requirements referred to in paragraph 2 of article 7 to the territorial State would be an improvement, but the problem remained that to require the territorial State to be a party to the Statute or to have accepted the jurisdiction of the Court would impose severe restrictions on the Court's ability to intervene in cases of genocide and crimes against humanity. He supported the views of the representative of New Zealand in that regard. The United Kingdom proposal should be amended along the lines suggested by the Republic of Korea, although Italy remained flexible as to whether all the jurisdictional links suggested by the Republic of Korea should be listed in article 7 or only the custodial State and territorial State links proposed by the United Kingdom. What was important was for the criteria to be alternative and not cumulative, in order to ensure a proper balance in the jurisdiction provisions of the Statute and a sufficiently wide opportunity for the Court to perform its functions.

21. **Mr. SCHEFFER** (United States of America) said that the United Kingdom text for article 6 in the "Further option for articles 6, 7, 10 and 11" was acceptable with the deletion of the bracketed subparagraph (b). Like other delegations, the United States believed that States should refer whole situations and not individual cases, so as to be more comprehensive and fair.

22. Like many other delegations, the United States was inclined to support the United Kingdom text for paragraph 1 of article 7, but noted that it was based on the assumption that the definitions for each crime would be satisfactory, including detailed elements in an annex to the Statute. In the light of the continuing concerns of Member States, the United States reserved its position on requiring the consent of States, even if they were parties to the Statute, on a case-by-case basis, as set forth in option 2 in the first version of article 7.

23. With regard to universal jurisdiction, the United States supported the United Kingdom text for paragraphs 2 and 3 of article 7. It was essential that the reference to the State of nationality of the suspect as set forth in paragraph 2 (a) should be retained. On that issue, the United States agreed with the view that the universal jurisdiction proposal for the Court would represent an extraordinary principle, in conflict with certain fundamental principles of international law, and would undermine the Statute generally. The proposals by Germany and the Republic of Korea would have the effect of applying a treaty to a State without that State's consent, and in the absence of any action by the Security Council under Chapter VII of the United Nations Charter. Even if a State was not a party, the Court would have jurisdiction to judge its official acts and imprison even its head of State. Such a situation could not be justified on the basis of existing law and the United States objected to it in principle. An international treaty could not impose itself in that manner on non-party States; the only solution was to reach out to other States through the United Nations Charter and the powers of the Security Council that had been created by States under that separate treaty regime.

24. With regard to the States which must consent, the consent regime must include a non-State Party whose official actions were alleged to be crimes. That might be the State on whose territory a crime had occurred but, in the case of peacekeeping or international conflict, it might be another State: the State which had sent the troops concerned. That State should be responsible for their prosecution or for consenting to their prosecution by the Court.

25. Article 8 was acceptable.

26. **Ms. CUETO** (Cuba) said that States parties to the Statute should be those responsible for initiating Court action, and the principle of consent and complementarity was an essential basis for the jurisdiction of the future Court. Only the application of those principles could foster universal acceptance of the jurisdiction of the Court and promote its credibility and effectiveness. Arguments in favour of inherent jurisdiction were not convincing. The regime of consent would not prevent States parties from accepting the competence of the Court, by express declaration, in relation to basic core crimes defined in the Statute. An optional regime of acceptance would encourage most States to ratify the Statute and accept the action of the Court as a new international judicial body. In that context, Cuba favoured option 2 in the first version of article 7.

27. **Mr. EL MASRY** (Egypt) said that his delegation attached great importance to the principle of inherent jurisdiction, which was closely linked to the principle of complementarity, and considered that the State should be the principal mechanism for triggering Court action.

28. Under all the options, "aggression" was seen as aggression against a State or the political independence or territorial integrity of a State, but there could be aggression against a territory that was not an integral part of a State but was under its sovereignty. Previously, for example, Gaza, though not part of Egypt, had been administered by Egypt. The text should therefore also refer to territories.

29. Egypt agreed that the Court's jurisdiction should cover a State that was not a party if that State accepted the jurisdiction of the Court and if the accused came under the jurisdiction of that State or the act had occurred in its territory.

30. **The CHAIRMAN**, summing up the discussion so far, said that some States had made the point that the jurisdiction of the Court should primarily be triggered by States. Many delegations had expressed the view that upon becoming a party to the Statute, a State should automatically accept the Court's jurisdiction over the core crimes. Other States believed that an additional jurisdictional link, such as a declaration, was a precondition to the

exercise of jurisdiction. Some delegations called for the consent of one or more of the following: the territorial State, the custodial State, the State of nationality of the accused and the State of nationality of the victim. Some States preferred cumulative consent, while others preferred that the consent of one of the States should suffice.

31. It had also been noted that if the States concerned were not party to the Statute, the Court could exercise jurisdiction with their consent. Some delegations had felt that no additional consent was necessary, but there had been objections to that contention.

32. The view had also been expressed that the automatic acceptance of the Court's jurisdiction should only apply with respect to genocide and crimes against humanity, and that war crimes should not fall under that system but be governed by another jurisdictional regime. Some delegations, however, did not favour an automatic acceptance of the jurisdiction of the Court, feeling that not providing for automatic acceptance but allowing States to make declarations of acceptance of the Court's jurisdiction would facilitate the entry into force of the Statute.

33. Most delegations felt that any State party to the Statute should be able to trigger the Court's jurisdiction, but some delegations thought that only interested States should be able to do so. Some had argued that States not parties should be able to trigger the Court's jurisdiction in exceptional circumstances, while others had felt that that should not be the case.

34. Most States felt that situations should be referred to the Court rather than individual cases, but the possibility of referring matters had also been suggested. It had been agreed that the automatic acceptance system would not apply to treaty crimes if they were included.

35. A number of delegations had referred to the "Further option for articles 6, 7, 10 and 11" and many had suggested that the structure used in that option might serve as a basis for discussion.

36. He invited further comments.

37. **Mr. EFFENDI** (Indonesia) said that the Court offered a wide range of benefits and that his delegation would return to the articles on jurisdiction at a later stage, after the Committee's deliberations on articles 15, 16 and 17 on admissibility, article 18 on *ne bis in idem* and article 19, which were all closely related to the principle of complementarity which the Court should uphold.

38. **Mr. CHERQUAOUI** (Morocco) said that Court action should be triggered by a State party. If the Court was to be as universal as possible, States should be allowed to decide whether or not they accepted its jurisdiction, at least during the initial phase following its establishment.

39. Morocco supported the second option in article 8 and option 2 for article 11.

40. **Mr. PANIN** (Russian Federation) said that his delegation could not agree with the proposals of Germany and the Republic of Korea whereby the jurisdiction of the Court triggered by the complaint of a State could also extend to non-parties, as that approach was not consistent with international law. The Russian Federation was also unable to agree that an international treaty could create obligations for third parties which were not party to it. The only way the Court could exercise jurisdiction over a non-party was by means of a Security Council decision.

41. The Russian Federation saw the Court as exercising eminent jurisdiction when a situation was referred to it by the Security Council and when there were complaints from States in connection with the crimes of genocide

and aggression. The agreement of the State affected was not necessary in such cases. In other cases, such as crimes against humanity and war crimes, jurisdiction should be exercised with the agreement of the State on whose territory the crime was committed and the custodial State. Such agreement could be general or relate to specific cases.

42. **Mr. GÜNEY** (Turkey), referring to article 6, said that only States parties and the Security Council acting under Chapter VII of the Charter should be able to refer matters to the Court. In that context, it was more appropriate to use the word "matters" than "situations".

43. With regard to article 7, the exercise of jurisdiction required express State consent. Turkey consequently favoured option 2 for paragraph 1. It considered that paragraph 2 should be deleted.

44. Article 8 ("Temporal jurisdiction") should be retained but Turkey was flexible as to its location. With regard to article 9 ("Acceptance of the jurisdiction of the Court"), Turkey was against inherent and universal jurisdiction and believed that further consent was necessary. In that connection, the German proposal was useful but did not take account of the reluctance or concerns of the international community in respect of obligatory jurisdiction.

45. The proposal made by the Republic of Korea merited consideration and should be carefully and thoroughly examined. Express consent was required at the present stage.

46. **Mr. DIAZ LA TORRE** (Peru) favoured an independent court with jurisdiction over the core crimes. Its action could be triggered by States. States parties had an inherent right to present complaints, and the Court's jurisdiction should only be exercised over States parties to the Statute. Non-parties should consent to the Court's jurisdiction when necessary by means of the declaration referred to in article 7.

47. **Mr. DA COSTA LOBO** (Portugal) said that, by becoming parties to the Statute, States implicity accepted the jurisdiction of the Court in relation to all core crimes. There was no need or place for any other form of acceptance. Portugal endorsed the position of the German delegation with regard to States not parties to the Statute. The solution proposed would result in a more effective tribunal and was in harmony with international law.

48. **Mr. PALIHAKKARA** (Sri Lanka) said that the proposals made by the United Kingdom and France provided a useful basis for discussion with a view to finding a middle ground between inherent jurisdiction and consent at each and every stage. An inclusive approach on the important issues of consent and jurisdiction was desirable. In that context, consensus would not be assisted by further expanding the referral provisions in the draft Statute.

49. **Mr. MADANI** (Saudi Arabia) said that the words in square brackets should be deleted in paragraph 1 (b) of the first version of article 6, and the opening clause of that paragraph should begin "The Court may exercise its jurisdiction ...". His delegation favoured the "option 2" text in article 7, with the deletion of the words in square brackets; it preferred option 2 for article 9 and it favoured option 2 for article 11, with subparagraphs (a), (c) and (d).

50. **Mr. AL AWADI** (United Arab Emirates) said that his delegation would prefer the deletion of the words "or a non-State party" in paragraph 1 (b) of article 6 and favoured option 2 in article 7, with certain amendments which would be submitted to the relevant working group.

51. His delegation preferred option 2 for article 9, but had reservations on paragraph 4. In regard to article 11, option 2 was preferable to option 1 provided that the right was limited to the State on whose territory the act had

taken place, the State of nationality of the suspect and the States of nationality of the victims. In the text for article 6 in the "Further option for articles 6, 7, 10 and 11", the opening clause and subparagraph (a) also met his delegation's concerns.

52. **Ms. DIOP** (Senegal) said that her delegation supported the text for article 6 in the "Further option for articles 6, 7, 10 and 11", and the concept of inherent jurisdiction of the Court in article 7, paragraph 1. It was particularly important that a State's acceptance of jurisdiction should be totally transparent and complete. Any State becoming a party should accept and respect the obligations and commitments imposed by the Statute. Further express consent or case-by-case consent would not be necessary. In that connection, the proposals of the United Kingdom and the Republic of Korea provided an excellent basis for compromise.

53. On the question of non-parties, Senegal agreed with the United Kingdom and Republic of Korea proposals, which might be merged to allow a non-party to make a declaration of consent or acceptance to the Secretary-General of the United Nations rather than to the Court's Registrar.

54. Referral to the Court by States and by the Security Council should be based on situations rather than cases. In that connection, Senegal agreed with paragraphs 1 and 2 of article 11 in the "Further option for articles 6, 7, 10 and 11", but not with paragraph 3.

55. **Mr. PHAM TRUONG GIANG** (Viet Nam) said that unless the principle of complementarity was adequately and clearly incorporated into the Statute, the Court would face certain difficulties. His delegation therefore favoured the opt-in option, which appeared to be in accordance with international law and practice.

56. With regard to article 6 (first version), Viet Nam would support paragraph 2 if the bracketed words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and" were retained. Option 2 in article 7 appeared to be in accordance with international law and practice and was therefore acceptable.

57. **Mr. KERMA** (Algeria) said that his delegation was in full agreement with the statement adopted recently at Cartagena by the States members of the Non-Aligned Movement, calling for the Court to be free from political influence of any kind, particularly from the Security Council, and reaffirming that the Court's jurisdiction should be based on the consent of the States concerned. Those points would be essential in ensuring the success of the Court.

58. Algeria was in favour of paragraph 1 of article 6. The Court should exercise jurisdiction not only in respect of the core crimes but also in respect of treaty crimes. Only States parties to the Statute or States with an interest in a situation or case being referred to the Court, in line with the principle "no interest, no action", should be able to refer matters to the Court. The door should nevertheless be left open to non-parties to refer matters to the Court under certain conditions, some of which were already provided for in the draft Statute. State consent was fundamental. The consent of at least two States should be required: the State of nationality and the State of custody. Algeria had reservations on paragraph 1 (c), but otherwise favoured paragraph 2.

59. Algeria also preferred option 2 for article 9 and for article 11. With regard to article 10, its position was in line with what he had said at the beginning of his statement, although it recognized the essential role of the Security Council in maintaining international peace and security.

60. **Ms. KAMALUDIN** (Brunei Darussalam) said that her delegation had no problem with the referral of a situation by a State party in accordance with article 6 (in the "Further option for articles 6, 7, 10 and 11"), and was giving careful consideration to the proposal of the Republic of Korea for article 8, in respect of the requirement of State consent.

61. **Mr. ABDELKADER MAHMUD** (Iraq) said that only the State concerned should trigger the article 6 mechanism; the sovereignty of the State concerned should be safeguarded, and there must be no outside influence.

62. His delegation was in favour of option 2 in article 7 (first version); it supported paragraph 1 of article 8 with the removal of the square brackets; and it preferred option 2 for article 9. With regard to article 10, the Court must be independent of any political body. It was therefore unacceptable for the Security Council to have a role in the Court, bearing in mind the veto right given to certain States and the Council's membership and method of voting.

63. Iraq favoured option 2 in article 11 and the deletion of paragraph 4.

64. **Mr. KOFFI** (Côte d'Ivoire) said that, while the German proposal was attractive, the underlying concept had not as yet gained universal acceptance and therefore could not be supported for the time being.

65. The United Kingdom proposals, on the other hand, provided a sound basis for discussion and were acceptable. Non-parties should not have the right to lodge complaints and the word "situation" was more appropriate than "matters". His delegation had no objection to the Security Council referring a matter to the Prosecutor of the Court, pursuant to Chapter VII of the United Nations Charter. Regarding article 7 (see the "Further option for articles 6, 7, 10 and 11"), it supported the acceptance of jurisdiction by States; acceptance by either the territorial or the custodial State should be required. The requirement should be alternative and not cumulative in nature.

66. Acceptance by non-parties should be the subject of an express declaration, as provided for in paragraph 3 of article 7.

67. With regard to article 10, in view of the importance of covering aggression in the Statute, the role of the Security Council in such situations must be reflected and would not prejudice either the independence of the Court or its final decision.

68. **Mr. FADL** (Sudan) noted that only States could establish an international court, on the basis of a general agreement. His delegation did not object to the proposals for Court action to be triggered by States, but the involvement of the Security Council might detract from the effectiveness of the Court. Two main issues were involved. The first concerned complaints by States. He thought that, in line with a proposal made during the Preparatory Committee's discussions, the question of acceptance by the complainant State of the jurisdiction of the Court with respect to the crime concerned need not be considered; it would suffice to provide only that the complainant State should be a party to the Statute and an interested party. Furthermore, to give the Court inherent jurisdiction would favour a State that was not a party to the Statute, because in their case the consent of the custodial State or the territorial State or both would be required before the Court could exercise its jurisdiction, whereas in the case of States parties the Court would automatically exercise jurisdiction. That would discourage accession to the Statute.

69. The second point concerned the Security Council. The proposal was that the Council should be allowed to submit complaints to the Prosecutor or refer matters directly to the Court, without the consent of the State concerned being needed. That was dangerous; it was important that the Court should not be weakened.

70. His country supported the Non-Aligned Movement's statement concerning the establishment of the Court, adopted at Cartagena.

71. **Mr. ROGOV** (Kazakhstan) said that his delegation could not support proposals to extend the Court's jurisdiction to non-parties. He drew attention in that connection to the principle of non-retroactivity, according to which acts committed before the entry into force of the Statute were not in the Court's jurisdiction. Now under draft article 114, following the entry into force of the Statute it would take effect for each subsequently ratifying State only after such ratification. How then could it be applied in practice to the citizens of non-party States, which had not ratified it?

72. **Mr. BU-ZUBAR** (Kuwait) said that jurisdiction should apply to States parties only, and the reference in paragraph 1 (b) of article 6 to a "non-State party" should be deleted. Furthermore, the wording concerning the acceptance by States of the jurisdiction of the Court should perhaps be made more specific, by referring to the acceptance of jurisdiction with respect to a case that was the subject of a complaint lodged by a State.

73. Article 8 ("Temporal jurisdiction"), as the representative of Lebanon had pointed out, did not cover acts that began before but continued after the entry into force of the Statute. Care should be taken not to bar prosecution for such acts, and the words "unless the crimes continue after that date" should be added at the end of paragraph 1.

74. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that the exercise of the Court's jurisdiction should be based on State consent, in order to satisfy the principle of complementarity. The jurisdiction of the Court could not be split in the sense of having an inherent jurisdiction for some crimes such as genocide and an optional jurisdiction for other crimes. Her delegation supported the principle of acceptance of jurisdiction, rather than that of inherent jurisdiction, and was in favour of option 2 for articles 9 and of option 2 in both article 7 and article 11.

75. **Mr. BELLO** (Nigeria) said that his delegation believed in the principles of consent and complementarity and consequently fully approved the preamble to the Statute, in which the latter concept was clearly set out. It also believed that only States parties should, under article 6, have the power to refer matters to the Court, and was consequently in favour of paragraph 1 without subparagraphs (a) and (c), and of paragraph 2.

76. In setting up the Court, the international community was doubtless mindful of the many problems which had hindered such a move in the past, including the failure of the Security Council to act fairly and decisively in matters of global concern. Without prejudice to the powers of the Security Council under Chapter VII of the United Nations Charter, his delegation felt that the Security Council should have no role whatsoever with regard to referral of matters to the Court.

77. Nigeria was unable to support the power of the Prosecutor ex officio to refer a matter to the Court: the Prosecutor could not be given such wide powers with no checks or balances.

78. The Nigerian delegation preferred option 2 in each of the articles 7, 9 and 11; paragraph 4 of article 11 should be deleted.

79. **Mr. BAZEL** (Afghanistan) said that, in article 6, paragraph 1 (a), his delegation supported the referral of a "situation" to the Court. The proposal that the Commission on Human Rights should be able to refer matters to the Court was interesting. In addition, his delegation proposed provision for referral by the International Committee of the Red Cross.

80. With regard to State consent, his delegation supported the principle of complementarity. Without the cooperation of the States concerned, the Court would encounter numerous difficulties in carrying out its tasks. Afghanistan therefore supported option 2 in article 7. It also firmly supported the inclusion of aggression as a core crime in the Statute. The Court should deal with the matter independently and impartially and without pressure from other institutions.

81. **The CHAIRMAN** said that the Secretariat had taken note of the all the positions stated. Delegations that had not already done so were now invited to give their views on the role of the Prosecutor.

82. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) said that his delegation believed that it would be premature to give the Prosecutor the power to initiate investigations on his own. The Court would be established on the basis of a multilateral treaty and would be an international criminal court but not a supranational court, justifying the Prosecutor having ex officio powers of investigation. Moreover, the granting of ex officio power to the Prosecutor might lead to a conflict of competence between the Court and national courts, to international problems between the Court and States and ultimately to undermining the credibility of the Court. For those reasons, paragraph 1 (c) of article 6 and article 12 should be deleted.

83. The initiation of proceedings by the Prosecutor under the supervision of the Pre-Trial Chamber, as proposed in article 13, was not an acceptable formula. The trigger mechanism should be limited to States, individually or collectively, and situations should be referred by the Security Council only.

84. **Mr. MOCHOCHOKO** (Lesotho) said that his delegation was in favour of inherent jurisdiction of the Court and was opposed to any State consent regime. If an independent and effective Court was to be established, it was essential that the Prosecutor should have the authority to initiate investigations ex officio. If investigations and prosecutions could only be triggered by States and to some extent by the Security Council, the functioning of the Court would be dependent on the political motivations of those entities and as a result be severely hampered, because in practice States and the Security Council would be reluctant, or unable, to lodge complaints or refer situations to the Court.

85. For the powers of the Prosecutor, Lesotho preferred the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", as it was more precise than the original article 6. It was not in favour of article 7 in that option, which would constitute a further impediment to the Court's effective functioning as a complement to national criminal jurisdictions. If that provision was intended to cover non-parties, that should be clearly stated.

86. His delegation agreed with the overall tenor of article 12 and believed that it should be up to the Prosecutor to decide whether or not to proceed with an investigation. To preserve prosecutorial independence, the word "may" would be preferable to "shall" in the first line. The contribution of information from victims, in addition to information from other sources, would be particularly significant in bringing perpetrators to justice, and the text allowing the Prosecutor to receive information from any source should be retained.

87. With regard to article 13, a fully independent Prosecutor subject only to judicial confirmation of indictments at the conclusion of an investigation would be preferable. While judicial review of the decision to commence investigations might seem useful in ensuring fairness, such a review might be too great an impediment for the Prosecutor. If necessary, his delegation would be prepared to reconsider its position on that issue but, in order to make it clear that at that stage of the proceedings the Prosecutor was not required to prove a *prima facie* or probable cause, appropriate wording to that effect should be included in article 13 or elsewhere. Similarly appropriate

wording would be required to indicate that the Prosecutor was not prevented from resubmitting a request on the basis of fresh evidence.

88. **Mr. NIYOMRERKS** (Thailand) said that his delegation could accept paragraph 1 (c) of article 6 (first version), and paragraph 2 with the inclusion of the words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9". It could agree to the Prosecutor initiating investigations ex officio on the basis of information obtained from any source, including non-governmental organizations, as provided for in article 12. It supported article 13 as it stood and endorsed the role of the Pre-Trial Chamber in considering the basis on which the Prosecutor should be allowed to proceed further with an investigation.

89. **Mr. AL HUSSEIN** (Jordan) said that, in the interests of an effective and credible Court, the Prosecutor would have to be in a position to refer matters to it, in compliance with the principle of complementarity, and to initiate investigations on the basis of information analysed responsibly and in a manner unaffected by international media coverage.

90. With regard to article 12, the Prosecutor should not be restricted as to the sources from which relevant information might be drawn, given the article 13 mechanism which, together with articles 47 and 48, would militate against an abuse of powers by the Prosecutor.

91. His delegation remained flexible as to the square brackets in article 12. The wider brackets around articles 12 and 13 should be removed.

92. **Mr. KANDIE** (Kenya) said that his delegation saw no reason why the Prosecutor would require ex officio powers to trigger Court action. The twin triggers of States and the Security Council, subject to appropriate controls, were sufficient to cover all cases which would need to go before the Court. Article 6 (c) and other provisions dealing with ex officio powers of the Prosecutor should therefore be deleted.

93. **Mr. GONZALEZ GALVEZ** (Mexico) said that the Prosecutor should be able to refer a matter to the Court, and to gather information from the sources mentioned in article 13.

94. To ensure independence, the judges in the Pre-Trial Chamber should not be the same as those in the Court itself or in the Appeals Chamber.

95. **Mr. DIAZ PANIAGUA** (Costa Rica) said that his delegation thought that the Prosecutor should be able to begin investigations on his own initiative, and that that power should be included in article 13. The independence of the Prosecutor and the Court and their freedom from political influence were adequately safeguarded. The Court should have inherent jurisdiction, as proposed by the German delegation.

96. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that the Prosecutor should have autonomous competence and the right to refer matters to the Court. In article 6 ("Further option for articles 6, 7, 10 and 11"), he thought that States parties or the Security Council should refer matters not to the Prosecutor but directly to the Court. In view of his independent status, the Prosecutor should be able to receive complaints both from States and from governmental or non-governmental organizations or individuals.

97. The Prosecutor should be able to receive information from any source and carry out the necessary inquiries before referring the matter to the Court. It was not necessary for the Court to have a pre-trial chamber to study

matters that would be submitted to it. Well-grounded and well-documented complaints submitted by States parties, the Security Council or the Prosecutor could be considered directly by the main chamber, and then there could perhaps be a higher body, such as an appeals court.

98. **Mr. ASSHAIBANI** (Yemen) said that, like many other delegations, his delegation had difficulty in accepting that the Prosecutor should be able to take the initiative to open investigations or present cases. That was a matter for States alone.

99. **Mr. ABDELKADER MAHMUD** (Iraq) said that the Prosecutor should not be able to take the initiative to open investigations or act on his own initiative, particularly as an individual might be susceptible to political influence.

100. **Mr. TAÏB** (Morocco) said that the Prosecutor should have an independent role and be able to initiate investigations ex officio. However, such action should be subject to the agreement of the Pre-Trial Chamber. Information should only be obtained from States and organizations in the United Nations system.

101. **Mr. JANDA** (Czech Republic) said that his delegation recognized the primary role of the State. It believed that the Prosecutor should be empowered to initiate proceedings before the Court on his or her own initiative. An ex officio Prosecutor would mean a more effective Court because the Court would thus be open to various sources, including non-governmental organizations and individuals. The competence of the Prosecutor should relate only to the core crimes, as set out in article 5.

102. His delegation was in favour of article 12.

103. **Mr. EFFENDI** (Indonesia) said that paragraph 1 (c) of article 6 should be deleted. The Prosecutor should not be able to initiate investigations *proprio motu*.

104. **Mr. RAMA RAO** (India) said that his delegation attached great importance to the impartiality and objectivity of the Prosecutor in conducting his functions of investigation and prosecution. The success of the Court would depend in great measure on cooperation among States aimed at punishing heinous crimes of international concern. While the Court's jurisdiction would be individual, the nature of the crimes was such that the reputation of Governments would inevitably come under scrutiny.

105. The necessary cooperation would not be promoted by allowing the Prosecutor to act on his own, on the basis of sources of information, regardless of their reliability. Such an ex officio role for the Prosecutor would jeopardize the principle of complementarity which was generally accepted as the basic foundation for the establishment of the Court.

106. **Ms. CONNELLY** (Ireland) said that, to be truly effective, an enforcement mechanism for international humanitarian law must allow victims an audible and direct voice which did not depend upon a State party or the Security Council for its expression. It was no accident that the first time the word "victim" appeared was in article 13 in relation to the information submitted to the Prosecutor. The Prosecutor should have the competence to receive information about a crime covered by the Statute directly and from any source, including victims, persons acting on their behalf and non-governmental organizations. The Prosecutor would have to sift the information received on the basis of objective criteria and assess whether there was a reasonable basis for an investigation. In that connection, it should be borne in mind that generally acceptable criteria had been used as early as the 1920s by the League of Nations in evaluating information submitted to it in the context of a regime for the

protection of minorities. At the present time, under the international human rights treaties, complaints had to satisfy a number of criteria if they were to be processed further.

107. Without the application by the Prosecutor of objective and generally accepted criteria in evaluating information, the credibility of the entire system would be undermined. The office of Prosecutor was a key institution in the structure and operation of the Court, and the person holding the office must have an excellent knowledge of criminal law and procedure and of the relevant international law, and be a person of the highest integrity and sound judgement. However, if the Prosecutor was to have the competence to receive information from a wide range of sources, it would be too great a responsibility for the evaluation of that information to rest with that person alone. The proposal in article 13 for a further safeguard in connection with the handling of such information, namely that it be subject to confirmation or rejection by a pre-trial chamber, was therefore a good one, and would make the Court more accessible and relevant to those affected by or concerned with violation of international humanitarian law. It would strengthen the Court's ability to act, and she hoped that it would be generally acceptable to States.

108. **Mr. IVAN** (Romania) said that an independent and effective international criminal court would require an independent prosecutor able to trigger ex officio the necessary jurisdictional mechanisms and refer matters to the Court. His delegation could nevertheless accept that, to prevent any abuse of power, the role of the Prosecutor should be subject to an independent pre-trial chamber.

109. The Prosecutor should be allowed to trigger the jurisdiction of the Court on his own initiative and not only following a decision by the Security Council or a State party. Concerns that there should be some safeguards in respect of the Prosecutor's authority were already partially addressed in the Statute by the creation of a pre-trial chamber, which would review all indictments submitted by the Prosecutor to determine whether or not a *prima facie* case existed and whether the admissibility requirement under article 15 had been met.

110. The proposals of the delegations of Germany and Argentina were complementary to the solution proposed by the United Kingdom delegation. The Romanian delegation was in favour of the United Kingdom proposal as a viable way of allowing ex officio prosecution and, at the same time, ensuring judicial reviews of the Prosecutor's actions.

111. **Mr. NATHAN** (Israel) said that his delegation was unable to support the proposal for ex officio, *proprio motu* investigations by the Prosecutor. Under the preamble, the Court was intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole. If the Prosecutor took over the proposed functions, a situation might result in which no complaints by States were put forward. Furthermore, there would be a risk of the Prosecutor being overburdened by a multitude of complaints from bodies of all kinds, including frivolous or political complaints which would adversely affect the Prosecutor's independence and standing. No parallel could possibly be drawn with the Statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, because there was no State involvement in those tribunals and investigations had to be conducted by the Prosecutor acting *proprio motu*.

112. Regrettably, investigations initiated by the Prosecutor without the backing of a complainant State were likely to be ineffective as he would be dependent on the cooperation and assistance of private or other bodies, and thus be deprived of the basic requirements for an efficient and effective investigation of the crime in question. Article 12 should therefore be deleted.

113. With regard to the Security Council, under Article 24 of the United Nations Charter the Security Council had primary responsibility for the maintenance of international peace and security, a provision which might give the Security Council a role vis-à-vis the Court and might require the Security Council to refer matters to it in situations involving Chapter VII of the Charter. The role of the Security Council in that context was limited to situations arising under Chapter VII of the Charter and not under Chapter VI, which dealt with the settlement of disputes, with no necessary connection with the commission and prosecution of crimes subject to the jurisdiction of the Court.

114. With regard to the powers of the Security Council in relation to the determination of the existence of an act of aggression, it would be inappropriate at the present stage at least to include the crime of aggression in the jurisdiction of the Court. If, however, aggression was included in the Court's jurisdiction, determination by the Security Council under Article 39 of the Charter of the existence of an act of aggression should be a precondition to the exercise of the jurisdiction of the Court in so far as acts of aggression were concerned. That function, a basic function of the Security Council under Article 24 of the Charter, could not be ignored by the Statute, transferred to the Court or shared with the Court.

115. Another point arose regarding paragraph 2 of article 10 in the "Further option for articles 6, 7, 10 and 11". His delegation considered that, when the Security Council was seized of a situation, matters should be in abeyance in the Court, but not indefinitely. Israel supported the proposal made that, for a limited period—perhaps a period of 12 months, which could be extended for a further 12 months—matters should be in abeyance.

116. **Mr. ROWE** (Australia) said that his delegation agreed that the Prosecutor should have the authority to initiate investigations *proprio motu* in accordance with the provisions of article 12, provided that his actions were subject to appropriate procedural safeguards such as those provided for in article 13, which proposed *inter alia* that the authorization of a pre-trial chamber should be obtained before an investigation could proceed.

117. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that there was a role for the Prosecutor provided that it was subject to safeguards. The Prosecutor should not have the right to initiate Court action on his own initiative on the basis of information given or sought from other sources, but might conceivably open inquiries ex officio on receipt of a complaint from a State, and subject to the consent of the State on whose territory the information would be sought. It was not desirable for the Prosecutor to have to inform the Security Council of any complaints he might receive under article 11.

118. **Ms. CUETO** (Cuba) said that her delegation was not in favour of extending ex officio authority to the Prosecutor to trigger Court action. Conflicts of interest and jurisdiction would undoubtedly arise and politically motivated investigations could affect the credibility of the Court. A frank commitment to international cooperation was preferable to the so-called impartiality of one individual.

119. **Mr. EL MASRY** (Egypt) said that many States would be deterred from acceding to the Statute if the Court were to allow other persons to trigger Court action. Regarding the Prosecutor's right to receive information from any source, certain safeguards should be imposed, allowing the Pre-Trial Chamber to check the accuracy of information.

120. **Ms. WONG** (New Zealand) said that her delegation supported the position of Lesotho, Ireland and other States which had argued in favour of *proprio motu* powers for the Prosecutor to initiate investigations. It would prefer there to be no judicial review of the Prosecutor's independent powers, but accepted that there might be a need for a mechanism such as that proposed in article 13, to overcome the concern of those delegations which had difficulties with giving the Prosecutor broad powers.

121. New Zealand supported article 12, with the word "may" rather than "shall". It supported article 13 as it stood and would wish to remove the square brackets around the first subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

122. The proposal that the United Nations human rights machinery should be linked to the Court should be given further consideration.

123. **Mr. MADANI** (Saudi Arabia), referring to article 12, said that the Prosecutor should not be able to trigger action on his own initiative, but only in connection with a complaint by a State or the Security Council in cases within its competence. The phrase "from any source" and the references to intergovernmental organizations and victims should be deleted. A pre-trial chamber would have an important role to play.

124. **Mr. WOUTERS** (Belgium) said that his delegation was fully in favour of giving the Prosecutor the authority to initiate prosecution ex officio. The compromise solution in articles 12 and 13 provided an excellent working basis.

125. **Mr. SCHEFFER** (United States of America) said that his delegation was in favour of deleting references to *proprio motu* action by the Prosecutor, and recommended the deletion of articles 12 and 13 from the Statute.

126. His delegation remained unconvinced by the arguments put forward in favour of a *proprio motu* Prosecutor, and rejected the idea that the community of States was so lacking in moral and political courage that, when faced with an atrocity meriting the attention of the Court, not one State party would respond. It was wrong to argue that States' unwillingness to invoke the Court's jurisdiction was presumptively foreshadowed by the past reluctance of States to take on national prosecution of atrocities. On the contrary, the Court would provide an alternative to overcome the variety of legal, political, practical and resource difficulties which had made States reluctant, if not unable, to take on such prosecutions.

127. The argument that the State and Security Council referral approach would mean a politicized Prosecutor, while the *proprio motu* approach would ensure an impartial one, seemed simplistic. It would be naive to ignore the considerable political pressure that organizations and States would bring to bear on the Prosecutor in advocating that he or she should take on the causes which they championed. Both organizations and States might seek to act politically, but there was a significant difference in the accountability of States, as opposed to individuals and organizations.

128. The discussion had also ignored the extent to which State and Security Council referral had a political component that was beneficial, if not essential, to the work of the Prosecutor. In making referrals, States were expressing political will and political support for the Prosecutor and his work, and signalling to other States the level of their concern about the situation at issue and their commitment to support and assist the Prosecutor both directly and in his or her dealings with other States, including those likely to be hostile to the Prosecutor's investigation. That involvement of States was critical. Under the *proprio motu* model, it would become too easy for States parties to abdicate their responsibilities and leave it to individuals, organizations and the Prosecutor to initiate cases without the foundation of political will and commitment that only States could provide. The Prosecutor might then become isolated in a difficult international arena without the clear, continuing support of States parties. In addition, the argument that a *proprio motu* Prosecutor would be able to base a decision on whether to pursue investigations solely on legal criteria was not persuasive. If the Prosecutor had the authority, and responsibility, to pursue all credible allegations from individuals or organizations, there would surely be many more complaints than the Prosecutor could possibly handle. Many of those complaints might, on the face of it, meet the

legal criteria for the initiation of an investigation, and the Prosecutor would not be able to use a simple legal checklist to choose which of several legally sufficient complaints to pursue, but would be required to make decisions of policy in addition to those of law.

129. Some prosecutorial discretion would be necessary and appropriate even in the context of a State referral regime. However, in the *proprio motu* setting, the exercise of prosecutorial discretion, which was not universally accepted, would become a frequent and essential step in preserving the proper functioning and focus of the Court. Considerably expanding the number of instances in which the Prosecutor might intervene was unlikely to result in good prosecutions, would undermine the perception of the Prosecutor's impartiality and would subject the Prosecutor to incessant criticism by groups and individuals who disagreed with his or her choices.

130. The *proprio motu* proposal thus risked routinely drawing the Prosecutor into making difficult public policy decisions which he or she was neither well equipped nor inclined to make. Such initial public policy decisions would be best made elsewhere, freeing the Prosecutor to deal for the most part with the law and the facts.

131. **Ms. CHATOOR** (Trinidad and Tobago) said that her delegation could in principle support the role of the Prosecutor in triggering the jurisdiction of the Court, and was flexible on the language in article 12. It was prepared to work with others on articles 12 and 13 in order to reach consensus. The checks and balances proposed in article 13 would provide a good basis for discussion.

132. The trigger mechanism should not be restricted to States parties only. That might not be in the interests of justice in the long run.

133. **Mr. GEVORGIAN** (Russian Federation) said that, if the Prosecutor was given direct power to initiate investigations, *proprio motu*, both the Prosecutor and the Court would become politicized.

134. **Mr. van BOVEN** (Netherlands) said that an ex officio role for the Prosecutor was essential if the Court was to be a viable institution. The Prosecutor should have the full use of all sources of information, from governmental and non-governmental sources as well as from victims' associations. As the representative of Ireland had said, victims must be given a voice. It was up to the Prosecutor to assess the pertinence and credibility of the information and his delegation was confident that the Prosecutor would act responsibly. On that basis, he or she would decide whether there were reasonable grounds for proceeding with an investigation.

135. His delegation also supported the idea of giving the Pre-Trial Chamber a role in exercising judicial review and authorizing the initiation of the investigation.

136. **Mr. STIGEN** (Norway) said that his delegation supported ex officio and *proprio motu* powers for the Prosecutor to trigger the Court's intervention. The exercise of those powers should be based on reliable information from any source. A qualified and independent Prosecutor would be the best insurance against politicized action by the Court, and should be able to deal with criticism in relation to the setting of priorities when there were many possible cases.

137. The Norwegian delegation nevertheless appreciated the doubts expressed by some delegations and believed that the proposed checks and balances, including the provisions regarding the Pre-Trial Chamber and the election of the Prosecutor and other rules, addressed those concerns. Norway supported the proposals of Germany and Argentina; it supported the principle of article 12, with the use of the word "may", and was happy with the wording of article 13.

The meeting rose at 1 p.m.